

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 10, 2001

Case No.: **2001-INA-32**
CO No.: **P1998-NY-02372462**

In the Matter of:

JAMES HOWE
Employer

on behalf of

GUADALUPE CANO
Alien

Certifying Officer: Dolores Dehaan
New York, New York

Appearance: Alphonso F. Ramous, Esquire
New York, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On March 10, 1997, James Howe ("Employer") filed an initial *Application for Alien Employment Certification* (ETA 750) to permit the employment of Guadalupe Cano ("the Alien") as a "Cook, Spanish." (AF 14-15). The duties were described as follows:

Plan menu and cook Spanish dishes as: Tacos, Arroz con Pollo, Ceviche Mixto, Guacamole, Burritos, Paella, Fajitas, Frijoles Negros, Enchiladas, Tamales, etc. in private home according to recipes or tastes of employer. Prepare vegetables & meats for cooking. Boil, broil, fry and roast meat. Bake bread & pastries. Clean kitchen & cooking utensils. Prepare fancy dishes pastries. Cook food in quantities according to menu and number of persons to be served.

(AF 14). The only qualifications for the position listed by the Employer was two years experience in the job offered.

On June 21, 1999, the CO proceeded to issue an initial Notice of Findings ("NOF1") proposing to deny the application for reasons which included the Spanish cooking issue. (AF 20.24). Although the Employer filed a rebuttal which included a defense of the requirement, it appears that the ETA 750 was amended to delete reference to "Spanish dishes as: Tacos, Arroz con Pollo, Ceviche Mixto, Guacamole, Burritos, Paella, Fajitas, Frijoles Negros, Enchiladas, Tamales, etc." The case was then remanded to NYDOL in order to undergo the recruitment process. (AF 26). The job offering was advertised by the Employer as "Cook, Household (Live-out) with a stated salary of \$17.43 per hour. (AF 26).

Seventeen resumes were referred to the Employer in response to his advertisement. (AF 42-94). This included the resume of Penelope Roach in which she reported having worked as a Cook (Household) from 1995 to the present (1999) with the following duties:

Purchased foodstuff. Prepared specialty dishes. Baked bread and pastries. Prepared Holiday dishes for large group. Created Heart Healthy Menus. Prepared and Arranged Hors D'ourves for cocktail parties.

(AF 74). Ms. Roach's prior experience included conducting an independent catering service. *Id.*

The Employer filed a recruitment report stating various reasons for rejecting all 17 applicants. (AF 87-91). This included the following regarding Ms. Roach:

Made initial contact on 1/17, and interviewed her on 1/19 at 9:00 p.m. She has some experience with spanish food, but would need to follow recipes. We would like someone more experience in this regional cooking.

(AF 89).

On April 13, 2000, the CO issued a second Notice of Findings ("NOF2") proposing to deny the application on the basis that the Employer had rejected applicants, including Ms. Roach, for other than lawful job-related reasons. (AF 97-99). The CO noted, in this regard, that the Employer could not reject applicants for not having any experience cooking Spanish dishes since he had deleted this requirement from the ETA 750 following the issuance of NOF1. The Employer was advised that he could rebut this finding by further documenting specific lawful job-related reasons for the rejection of the applicants. (AF 97-98).

After an extension of time, Employer filed a rebuttal on June 19, 2000. (AF 102-3). The Employer offered the following rebuttal regarding his rejection of Ms. Roach:

Although Mrs. Roach has worked within a household before, I believed that the wages we are offering would not be sufficient considering what she presently is being paid. Moreover, I felt that her experience was quite limited for the position offered, since the recipes that she is knowledgeable of are different from our own; as a result, the taste of the dishes prepared will be different and not to our taste preference. As per her resumes it appears that her job experience does not consist in frying, roasting, boiling and broiling meats; washing, peeling, trimming, preparing and cooking meats, but mainly on baking breads and pastries, preparing and arranging hors d'oeuvres for cocktail parties, as opposed to day to day and minute to minute responsibility of preparing 3 meals a day on an everyday basis. Her work experience seems holiday and occasion type of cook. We would like someone more experience in this regional cooking.

(AF 102) (Emphasis added.).

The application for certification was rejected by the CO in a Final Determination ("FD") issued August 3, 2000. (AF 106-107). The CO found that Ms. Roach had been rejected for other than lawful job-related reasons for the following reasons:

Based on employer's documentation in reference to Ms. Roach, it appears that Ms. Roach was never interviewed and was rejected based on her resume. We note item # 13 of the ETA 7-50A form described the job duties, plan menus and cook meals in a private home according to **tastes/recipes of employer**. It is not clear to us why a Cook cannot follow the recipes given by an employer. It appears that Ms. Roach was not rejected for specific lawful job related reasons. Based on employer's minimum requirements Ms. Roach is qualified for the position offered.

(AF 106). The Employer requested a review of the denial of his application and the record has been submitted to the Board for such purpose.

Discussion

Section 656.21(b)(6) of the regulations provides that “[i]f U.S. workers have applied for the job opportunity, the employer shall document that they have been rejected solely for lawful job-related reasons.” Further, § 656.24 (b)(2)(ii) provides, in pertinent part:

The Certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed.

Id.

The Board has held repeatedly that where an applicant’s resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not state expressly that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant’s credentials including the granting of an interview. *See, e.g., H.L. Walker & Assoc.*, 1992-INA-328 (June 2, 1993). The Board has also held that once an employer has rejected an apparently qualified applicant for an unlawful reason, the CO is not required to investigate the legitimacy of a totally independent reason for rejection raised for the first time in the response to the NOF. *Foothill International, Inc.*, 1987-INA-637 (Jan. 20, 1988).

The Employer’s recruitment report was to the effect that Ms. Roach was interviewed but was rejected strictly on the basis that she had little or no experience cooking “Spanish” foods. It has been repeatedly held that an employer unlawfully rejects an applicant because he or she does not meet requirements not stated in the application or advertisement for the position. *See, e.g., Jeffery Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991). As the Employer had deleted the Spanish cooking requirement from his application and had not advertised the position with such requirements, the CO was correct in challenging Ms. Roach’s rejection in the NOF.

Different reasons were offered by the Employer for Ms. Roach’s rejection in the Employer’s rebuttal. He now contends that the CO’s failure to accept the reasons was due to her failure to recognize that he had, in fact, interviewed this applicant. However, in reviewing the Employer’s rebuttal statement, we must conclude that at least part of the rejection was based solely on her resume and not as the result of a further investigation of her credentials by way of an interview. The Employer has merely assumed on the basis of the resume that she does not have experience performing such functions as frying, roasting, boiling and broiling meats; washing, peeling, trimming, preparing and cooking meats. He does not allege that he obtained such information from his purported interview of the applicant. It would appear to us that working a number of years as a household cook, Ms. Roach would have had such experience.

As to the Employer’s representations that Ms. Roach was dissatisfied with the salary

offered, it is interesting to note that although the Employer had indicated in his recruitment report that another applicant would not accept the position at the salary offered, no such reason was given regarding Ms. Roach's rejection in this report. In any event, an employer may not reject an applicant as unwilling to accept the salary offered unless the position has been offered to the applicant at the listed salary. *Impell Corp.*, 1988-INA-298 (May 31, 1989) (*en banc*).

We wish to further observe that the Employer's contention, that the taste of dishes Ms. Roach prepares will be different and not to their taste preference, is also without merit. Reportedly, he has not as yet employed the Alien and he has no guarantee that his cooking will be to their taste preference either. Minimal direction should cure any such problem.

Finally, the Employer has represented in his justification for a household cook that he entertains on a regular basis. It would seem to us that Ms. Roach's additional experience catering parties would be a plus not a detriment to her meeting the Employer's needs.

The Employer has rejected Ms. Roach for other than lawful job-related reasons and his application was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby upheld.

Entered at the direction of the panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals**

**800 K Street, N.W., Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.